No. 89-1894

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CEFERINO COLOMA, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS AND CHEVRON SHIPPING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner suffered work-related injury while employed as a cook and messman in a "crews' mess" located on a wharf. The question presented is whether the court of appeals was correct in holding that petitioner did not meet the "status" requirement for coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Atlantic Container Serv., Inc. v. *Coleman*, 904 F.2d 611 (11th Cir. 1990)	11
Browning v. *B.F. Diamond Constr. Co.*, 676 F.2d 547 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983)	11
Chesapeake & O. Ry. v. *Schwalb*, 110 S. Ct. 381 (1989)	4, 6, 7, 8, 9, 10, 11
Director, OWCP v. *Perini North River Assocs.*, 459 U.S. 297 (1983)	8, 9, 12
Dorris v. *Director, OWCP*, 808 F.2d 1362 (9th Cir. 1987)	4-5
Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 (1972)	8
Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985)	3, 7, 8, 9, 10, 11
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977)	6, 7, 9
Odom Constr. Co. v. *United States Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981)	10
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 (1979)	7
Sanders v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085 (11th Cir. 1988)	5, 10
Schwalb v. *Chesapeake & O. Ry.*, 235 Va. 27, 365 S.E.2d 742 (1988)	9
Union Texas Petroleum Corp. v. *PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990)	11

Cases—Continued: Page

Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976).... 3-4, 8

Statutes:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:

§ 2(3), 33 U.S.C. 902(3) 2, 3, 4, 5
§ 2(3), 33 U.S.C. 902(3) (1982) 6
§ 3(a), 33 U.S.C. 903(a) 2, 6

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(a), 86 Stat. 1251 2-3

Miscellaneous:

Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims under Amended Longshoremen's Act* (Aug. 10, 1977) 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1894

CEFERINO COLOMA, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS AND CHEVRON SHIPPING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 897 F.2d 394. The order of the Benefits Review Board denying reconsideration (Pet. App. A15-A17) is reported at 21 Ben. Rev. Bd. Serv. (MB) 318; the Board's original decision and order (Pet. App. A18-A23) is reported at 21 Ben. Rev. Bd. Serv. (MB) 200. The decision of the administrative law judge (Pet. App. A25-A30) is reported at 18 Ben. Rev. Bd. Serv. (MB) 434 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1990. The petition for a writ of

certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by respondent Chevron Shipping Company as a messman and cook. Pet. App. A3. From 1977 to 1982, he worked at the "Seagull Inn," the Chevron "crews' mess" on the Richmond Longwharf near San Francisco. The "primary function" of the Inn "was to provide meals to the officers and seamen of visiting Chevron tankers while their shipboard stewards took shore leave." Pet. App. A4; Pet. 5. In 1982, Chevron closed the Inn and began feeding its crew members either at a cafeteria about a mile away or by using messmen who remained aboard the tankers. Pet. App. A5, A13. About that time, petitioner was diagnosed as suffering from an occupational disease, benign keratoma with lichenoid dermatitis on both hands, caused by repeated exposure to harsh cleansing agents in the course of his employment with Chevron. Pet. App. A3-A4. The parties stipulated that the injury arose on a "maritime situs" as defined by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), and resulted in permanent disability. Pet. App. A4. The only dispute is whether petitioner's work also met the Act's "status" test for coverage, *i.e.*, whether it constituted "maritime employment" as defined in 33 U.S.C. 902(3).[1]

---

[1] Since petitioner's injury arose on July 28, 1982, his claim is governed by the 1972 version of the LHWCA, rather than the Act as amended in 1984. See Pet. App. A4 n.1. The 1972 version of Section 2(3), Longshoremen's and Harbor Work-

2. After a hearing, an administrative law judge denied benefits on the ground that petitioner was not engaged in "maritime employment." Pet. App. A25-A30. The ALJ found that petitioner's tasks of cleaning tables, washing dishes, and cooking were neither "inherently maritime" nor "significantly different" from the tasks performed at any land-based restaurant. Pet. App. A29. Relying on *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), he further found that petitioner's employment did not involve "any aspect of the process of loading, unloading, repairing or building vessels" and had "no connection with loading or unloading of ships, moving cargo between ships and land transportation, or ships [*sic*] construction or repair." Pet. App. A30.

3. The Benefits Review Board affirmed. Pet. App. A18-A23. It noted that while maritime employment is not limited to the occupations specifically listed in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), some connection with the loading or construction of ships is required under this Court's interpretation of Section 2(3) in *Herb's Welding*. The Board held that petitioner's work as a cook had no such connection. Pet. App. A21-A22. The Board then applied an earlier test employed by the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (1975),

---

ers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(a), 86 Stat. 1251, provided that:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

cert. denied, 429 U.S. 868 (1976), under which claimants satisfy the requirement of Section 2(3) if their work has a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Pet. App. A21-A22 (citation omitted). Under this test, the Board found that petitioner's work was "not done in furtherance of 'traditional' maritime activity" and thus was not covered employment. Pet. App. A22.

On reconsideration, the Board rejected petitioner's contention that his work was directly linked to loading and unloading because the Seagull Inn served tanker workers who loaded and unloaded cargo. The Board ruled instead that "claimant's work as a messman/cook was so far attenuated from employer's cargo transfer operations * * * [that] he was not engaged in maritime employment for purposes of the Act." Pet. App. A16.

4. The court of appeals affirmed. Pet. App. A1-A14. It determined that this Court definitively stated the applicable status test in *Herb's Welding* and *Chesapeake & O. Ry.* v. *Schwalb*, 110 S. Ct. 381 (1989), as one that dictated coverage for those whose work involved "the essential elements of loading and unloading." Pet. App. A8-A10. The appellate court noted in addition that this Court has rejected *Weyerhaeuser*'s "significant relationship" test by reversing lower court decisions applying *Weyerhaeuser*. Pet. App. A10-A12. The court thus described as "plainly wrong" petitioner's assertion that a "long and unbroken" line of decisions had applied the *Weyerhaeuser* test, concluding instead that the "line * * * was broken following *Herb's Welding*," even in the circuit that had produced *Weyerhaeuser*. Pet. App. A11-A12 (citing *Dorris* v. *Director, OWCP*, 808

F.2d 1362 (9th Cir. 1987)).[2] Accordingly, the court below did not reach the question whether petitioner could meet the *Weyerhaeuser* standard, since to apply that test "would be to ignore the clear and direct mandate from the Supreme Court." Pet. App. A12-A13.

The court of appeals then applied the standard articulated in *Herb's Welding* and *Schwalb*. Pet. App. A13-A14. It held that petitioner's functions as a messman and cook were not "essential" to Chevron's loading and unloading of oil tankers, particularly because those operations have continued and crew members have eaten elsewhere after the Seagull Inn closed in 1982. Pet. App. A13. The court distinguished the functions of the employees in this case from those of the employees in *Schwalb*, finding that the covered maintenance and repair workers in *Schwalb* were an "integral part of the loading process" without which that process "could not continue," while "[n]o such dependence exists in this case." Pet. App. A13-A14. The court therefore concluded that petitioner was not engaged in "maritime employment" under Section 2(3) of the Longshore Act.

---

[2] The court noted that the decision in *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085 (11th Cir. 1988), is "the lone exception among post-*Herb's Welding* cases to the general rule that Supreme Court doctrine interpreting Section 903(2) replaces circuit doctrine if the two are inconsistent." The court added that the Eleventh Circuit itself has "fluctuated in its interpretation of Section 902(3)." Pet. App. A12 n.10. As we explain below (pp. 10-11, *infra*), the Eleventh Circuit has since made clear that it applies the status test adopted by this Court.

ARGUMENT

The decision of the court of appeals applies settled legal standards to the particular facts of this case, and its conclusion does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. As amended in 1972, the LHWCA provides workers' compensation benefits to employees of maritime employers who meet both "situs" and "status" requirements. Workers must, first, be injured on a covered "situs," defined under the Act as "navigable waters * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Section 3(a), 33 U.S.C. 903(a) (1982). In order to meet the "status" requirement as well, employees must be "engaged in maritime employment," which the Act defines as "including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." Section 2(3), 33 U.S.C. 902(3) (1982); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 263-264 (1977).

Petitioner contends (Pet. 9-14) that this Court's opinions do not make clear how the "status" requirement of Section 2(3) should be interpreted. The contention is without merit. This Court has stipulated, first, that maritime employment "expressly includes the specified occupations but obviously is not limited to those callings." *Schwalb*, 110 S. Ct. at 384. The Court has in turn defined which land-based workers other than those in the specified occupations are in fact covered. Recognizing that Congress added the "status" requirement to avoid automatic coverage

of all employees injured on the maritime situs (see, *e.g.*, *Herb's Welding*, 470 U.S. at 423), the Court has adopted a functional approach that ties construction of the term "maritime employment" closely to the roles performed by employees in the occupations upon which the Act "focuses primarily"—longshoreman, harborworker, ship repairman, shipbuilder, and shipbreaker. *Northeast Marine Terminal Co.*, 432 U.S. at 273. As the Court has stated, "[t]he Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.'" *Herb's Welding*, 470 U.S. at 424. Rather, the Act covers all workers involved in "some portion" of the "overall process of loading and unloading vessels" (*P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal*, 432 U.S. at 267), whether the worker is checking and marking goods, as in *Northeast Marine Terminal Co.*, moving cargo, as in *P. C. Pfeiffer Co.*, or cleaning or repairing loading equipment, as in *Schwalb*. Recently this Court summarized its prior decisions as having "clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Schwalb*, 110 S. Ct. at 384; see also *Herb's Welding*, 470 U.S. at 424.[3]

---

[3] This Court has yet to entertain a case in which a worker, while not a "ship repairman, shipbuilder, [or] shipbreaker," has claimed to be a harborworker performing work that is "an integral or essential part" of ship repair, shipbuilding, or shipbreaking. That question is not presented here, and when it is, we assume the Court would apply an "integral or essential part" test analogous to that it has decreed appropriate for the cases of workers who claim to be aiding the

As consistently as this Court has propounded its functional, "essential part" test, it has rejected the results reached by courts applying the less-focused "significant relationship" standard proposed by petitioner. That standard was adopted by the Ninth Circuit, interpreting the 1972 Act's "status" requirement in a decision rendered before the first of this Court's cases construing that requirement. Lacking guidance from this Court, the Ninth Circuit announced that coverage under the LHWCA should be extended to those claimants whose "own work and employment" have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" *Weyerhaeuser*, 528 F.2d at 961 (quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272 (1972)).

On three separate occasions, this Court has reversed lower court decisions that applied the "significant relationship" standard. *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297 (1983); *Herb's Welding, supra*; *Schwalb, supra.* In two of these cases, the lower court had denied coverage under the "significant relationship" test, while this Court extended coverage under the standard that it applied. Thus in *Perini*, the Court held covered a construction worker building a sewage treatment plant extending over the Hudson River, because his injury on actual navigable waters would have been covered before the 1972 amendments. 459 U.S. at 315. In so holding, the Court reversed a Second Cir-

---

longshoring process. See *Herb's Welding*, 470 U.S. at 423-424; Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 11-12 (Aug. 10, 1977).

cuit decision denying coverage because that employment lacked a "significant relationship to navigation or to commerce on navigable waters." 459 U.S. at 301; see also *id.* at 302 & n.8, 318-319 & n.27, 320 n.29.

Similarly, in *Schwalb*, the Supreme Court of Virginia had applied the "significant relationship" standard to deny coverage to workers involved in the maintenance and repair of machinery used to transfer coal from rail cars to ships. *Schwalb* v. *Chesapeake & O. Ry.*, 235 Va. 27, 30-33, 365 S.E. 2d 742, 744-745 (1988). This Court reversed, declaring itself "quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires." 110 S. Ct. at 385.[4]

Finally, in *Herb's Welding*, this Court reversed a Fifth Circuit decision that had used the "significant relationship" test to extend LHWCA coverage to a welder injured on a fixed offshore oil drilling platform in Louisiana territorial waters. 470 U.S. at 418-419. The Court noted that "maritime employ-

---

[4] In view of the results in *Perini* and *Schwalb*, we disagree with the court of appeals' statement (Pet. App. A12) that this Court, in rejecting the "significant relationship" test, has accepted a "more restrictive standard." See also Pet. App. A11 (arguing that this Court has rejected "more expansive interpretations of the Act"). This Court held in *Northeast Marine Terminal Co.* that the "language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." 432 U.S. at 268. Indeed, in *Schwalb*, the error of the Virginia Supreme Court lay in its overly restrictive view of what constitutes an "essential" or "integral" part of loading and unloading ships.

ment" cannot be read "to eliminate any requirement of a connection with the loading or construction of ships." *Id.* at 423-424. In this instance, the Court held that the claimant's work as a welder had "nothing to do with the loading or unloading process" and was not "inherently maritime" in nature. *Id.* at 425.

It is evident that this Court has never found the *Weyerhaeuser* "significant relationship" test to be a consistent guide in determining the scope of LHWCA coverage, much less "a coverage beacon that ha[s] shone steadily since 1975," as petitioner claims (Pet. 8). Instead, in cases involving cargo-handling operations, the Court has repeatedly applied "an occupational test focusing on loading and unloading." *Schwalb*, 110 S. Ct. at 385.

In accordance with these pronouncements, the courts of appeals have adopted the same approach. See *Schwalb*, 110 S. Ct. at 384, 385 (noting that federal courts uniformly disagreed with "significant relationship" approach adopted by Virginia state court and citing cases). Petitioner's contention (Pet. 8-9) that an Eleventh Circuit decision, *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (1988), disrupts this uniformity is without merit. While the court in *Sanders* referred to an older Fifth Circuit case that employed the "significant relationship" test (841 F.2d at 1088 (quoting *Odom Constr. Co.* v. *United States Dep't of Labor*, 622 F.2d 110 (1980), cert. denied, 450 U.S. 966 (1981)), it ultimately applied a functional approach, concluding that "Sanders' responsibilities [as an industrial relations specialist] significantly related to and directly furthered ADDSCO's ongoing shipbuilding and ship repair operations." 841 F.2d at 1088. In any case, the Eleventh Circuit has recently reiterated that

the "*Schwalb* test supersedes any differing standard previously used by this court," including the significant relationship test articulated in *Sanders*. See *Atlantic Container Serv., Inc.* v. *Coleman*, 904 F.2d 611, 618 n.5 (1990); see also *Browning* v. *B.F. Diamond Constr. Co.*, 676 F.2d 547, 549-550 (11th Cir. 1982) (relying on "loading and unloading" test), cert. denied, 459 U.S. 1170 (1983).[5]

2. Petitioner asserts (Pet. 12-14) that this Court needs to clarify whether workers other than "longshoremen, ship repairmen, shipbuilders and shipbreakers" are covered by the Act, or whether only those engaged in "loading, unloading, repairing or building a vessel" are covered.

Insofar as petitioner's claim is a restatement of the contention that this Court has not clearly rejected the *Weyerhaeuser* standard (see Pet. 13-14), it is without merit for the reasons reviewed above. Insofar as petitioner's assertion is that this Court's opinions provide conflicting information concerning the scope of the status test, it also fails. This Court has made clear that " 'maritime employment' is not limited to the occupations specifically mentioned in § 2 (3)." *Herb's Welding*, 470 U.S. at 423; see also *Schwalb*, 110 S. Ct. at 384. As we have explained above, this Court's decisions also cover those employees whose work contributes in an integral or essential way to the functions performed by longshoremen

---

[5] *Union Texas Petroleum Corp.* v. *PLT Engineering, Inc.*, 895 F.2d 1043 (1990), the Fifth Circuit decision that petitioner alleges (Pet. 8-9) to have "compounded th[e] conflict" caused by *Sanders*, is not even an LHWCA case, and merely paraphrases the *Weyerhaeuser* test in a footnote that can only be characterized as dictum. 895 F.2d at 1049 n.9.

and harbor workers, including ship repairmen, shipbuilders and shipbreakers.[6]

Finally, to the extent that petitioner argues that the court of appeals wrongly applied the "integral or essential part" standard in this case, he presents a fact-bound issue that does not warrant review by this Court. The ALJ (Pet. App. A30), the Benefits Review Board (Pet. App. A16), and the court of appeals (Pet. App. A13) have all specifically concluded that, while the Seagull Inn served some tanker crew members whose work involved loading and unloading cargo, its operation was not "essential" to the loading and unloading operation.[7] Petitioner has not claimed that he performed any role independent of his work in the restaurant that was "essential" to other longshoring, ship repair, shipbuilding, or shipbreaking work by his employer.[8] The conclusion that petitioner was not engaged in "maritime employment" thus warrants no further review.

---

[6] As the Court made clear in *Perini, supra,* the LHWCA also covers workers injured over water who would have been covered before 1972.

[7] We do not here endorse the court of appeals' reliance on the fact that because the Seagull Inn closed in 1982, and "Chevron has not been forced to shut down its operations" (Pet. App. A13), it is clear that work in the restaurant before 1982 was not "essential to the loading and unloading process" (Pet. App. A14). The more pertinent inquiry, in our view, is whether during his employment by respondent, claimant's work was integral or essential to his employer's cargo transfer functions. See Pet. App. A16.

[8] Indeed, the Benefits Review Board ruled (Pet. App. A22) that even under the less focused *Weyerhaeuser* standard, petitioner's work did not satisfy the status requirement of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

ELLEN L. BEARD
Attorney
Department of Labor

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20081